PUBLIC PROSECUTOR

v.

KOW YEW LEE @ AH KOW

HIGH COURT MALAYA, JOHOR BAHRU
DATO' MOHD. GHAZALI BIN MOHD. YUSOFF JC
[CRIMINAL APPEAL NO. 42 - 24 - 91]
1 JULY 1994

CRIMINAL LAW: *Charge under s. 25(2) Prevention of Corruption Act 1961 - Alleged failure to comply with the requirements of a notice issued under s. 25 of the said Act - Whether elements of the offence proved - Lower Court Judge acquitting accused without calling for defence - Whether prosecution had proved its case beyond reasonable doubt.*

CRIMINAL PROCEDURE: *Prosecution seeking to recall witnesses after closing their case - Learned Judge allowing application and calling this part of the case an "enquiry" - Whether proper - Whether there were any provisions in the Criminal Procedure Code entitling the learned Judge to hold an "enquiry".*

The accused was charged with an offence of failing to comply with the requirements of a notice under s. 25 of the Prevention of Corruption Act 1961 (the Act) issued by the DPP at the request of the Anti Corruption Agency (ACA).

At the close of the case for the prosecution, the learned Sessions Court Judge acquitted the accused, holding that the prosecution had failed to make out a *prima facie* case due to the following:

(1) there were doubts that the copy of the notice (Ex. P1) had the same contents as the original notice as there were several cancellation marks in the said exhibit;

(2) no explanation was given by the prosecution with regard to the several cancellation marks appearing in P1;

(3) the heading to P1 refers to a non-existent Act, namely "The Prevention of Corruption Act No:57 of 1971";

(4) exhibit P4 was introduced contrary to the provisions of s. 66 of the Evidence Act 1950, namely, no notice was given by the prosecution of its intention to introduce secondary evidence;

(5) the DPP concerned (PW1) did not give sufficient consideration to the notice when he issued it.

On appeal by the prosecution, the question that arose was whether the prosecution had established, that a valid and lawful notice was issued under s. 25(1) of the Act, that the respondent was served with such a notice and, whether the respondent wilfully disregarded the requirements of the notice.

During the course of the trial, after the prosecution had closed its case, the prosecution applied to recall certain witnesses. The learned Sessions Court Judge allowed the application and treated this part of the case as an "enquiry". The further question that arose was whether there was any provision in the Criminal Procedure Code (the Code) providing for the holding of an "enquiry".

Held:

[1] From the evidence adduced by the prosecution it could not be seen how the Sessions Court Judge could come to the conclusion that PW1 did not give sufficient consideration when he issued the notice. PW7 had brought the letter (P4) from the ACA when he met PW1. P4 is an official letter and it bore the reference numbers of the ACA's general correspondence file and the relevant investigation papers. PW9 gave evidence that the investigation papers were opened based upon a police report.

[2] In the circumstances, the learned Judge's decision that PW1 had not given sufficient consideration when he issued the notice to the respondent was grossly against the weight of evidence as there was nothing to suggest that PW1 had issued the notice without considering the merits of the application. Further there was no material to show that PW1 had exercised his discretion unlawfully nor was there anything to show that he had abused his power in issuing the notice to the respondent.

[3] The effect of allowing an application to recall witnesses after the prosecution had closed its case would be that the trial should simply proceed as if the prosecution had not closed its case. The holding of an "enquiry" is an irregularity as it is not provided for in the Criminal Procedure Code. Nevertheless the irregularity of holding the "enquiry" was curable by s. 422 of the Code as it had not occassioned a failure of justice.

[4] In the circumstances the evidence adduced at the "enquiry" formed part of the prosecution case and the said evidence clearly showed that there were no cancellation marks when P1 was introduced as an exhibit. In any event the respondent was not prejudiced by the cancellation marks as his writing and signature appears on it and furthermore he has been served with the original copy.

[5] The error in quoting the year of the Act in the notice as "1971" rather than "1961" was not material and neither was it so defective or misleading so as to occasion a failure of justice and vitiate the notice. Following the principle enunciated in the case of *Lee Chiang Seng & 9 Ors. v. PP*, that a mistake as to a matter of form, namely, an incorrect citation of an Act, is not so defective as to vitiate the conviction, the error in naming the year of the Act is not so defective as to vitiate the notice issued by the DPP under the Act. It is clear that there is only one Prevention of Corruption Act and that it was revised in 1971. In the circumstances it could not be said that the error in naming the year of the Act had created a doubt in the prosecution's case.

[6] Although it is true that the letter P4 is a carbon copy, it is still a public document as defined under s. 74 of the Evidence Act 1950 and is certainly admissible under s. 65 of the same Act. In the circumstanmces, no notice as contemplated by s. 66 of the Evidence Act needed to be given when P4 was introduced.

[7] The prosecution evidence had shown that the respondent had failed to comply with the terms of the notice when he wilfully neglected or failed to include the existence and details of cash in a joint savings account with Public Finance Berhad when he submitted a statutory declaration pursuant to the notice issued to him under s. 25 of the Act.

[8] An appeal is merely a continuation of the trial and throws open all the evidence to re-examination in order to determine whether or not the various findings of the trial Court are correct. From a review of the record of appeal and the grounds of decision of the Sessions Court Judge, it was clear that the learned Judge's decision was grossly against the weight of evidence. The prosecution case clearly showed that they had established the charge against the respondent beyond reasonable doubt.

[Order of acquittal reversed. Respondent ordered to be called to enter upon his defence. Case remitted back to Sessions Court for continuation of trial before the same Judge]

Cases referred to:
Tan Boon Teck v. PP [1950] MLJ 44 ***(refd)***
Lee Chiang Seng & 9 Ors. v. PP [1967] 2 MLJ 32 ***(refd)***
PP. v. Rengasamy [1974] 1 MLJ 223 ***(refd)***

Legislation referred to:
Prevention of Corruption Act 1961, ss. 4(a), 23(1), 24, 25(1), (2)
Criminal Procedure Code, ss. 307, 422, 425, 407
Evidence Act 1950, ss. 65, 66, 74
Anti-Corruption Agency Act 1982, s. 5(2)

Other sources referred to:
Administrative Law of Malaysia and Singapore, Prof. MP Jain, pp. 279, 282

For the appellant - Abdul Rashid bin Daud; DPP
For the respondent - Muhammad Shafee Abdullah; M/s. Shafee & Co.

JUDGMENT

Mohd. Ghazali bin Mohd. Yusoff JC:

This is an appeal by the Public Prosecutor against the decision of the Sessions Court Judge, Johor Bahru acquitting the respondent on a charge under s. 25(2) Prevention of Corruption Act 1961. The charge reads as follows:

> That you on 4 February 1985 at the office of the State Legal Adviser Johor, in the District of Johor Bahru, in respond to a written notice under s. 25(1)(a) of the Prevention of Corruption Act 1961 dated 10 December 1984 issued by the Deputy Public Prosecutor, Johor did wilfully fail to comply with the terms of the said notice by wilfully omitting to enumerate the particulars relating to a certain movable property to wit cash in a joint Savings Account No. 4779 with Public Finance Berhad, 68-72 Jalan Wong Ah Fook, Johor Bahru, Johor in the name of yourself and one Teoh Suu Hwa which was opened on 11 September 1984 and subsequently closed on 12 December 1984 and that you have thereby committed an offence punishable under s. 25(2) of the Prevention of Corruption Act 1961 (Laws of Malaysia Act No. 57).

The prosecution case was that on 11 December 1984 the appellant was served with a notice (a copy of which was tendered by the prosecution as Ex. P1) issued under s. 25 of the Prevention of Corruption Act 1961. The said section reads:

> In the course of any investigation or proceedings into or relating to an offence, by any person, the Public Prosecutor may, notwithstanding anything in any other written law to the contrary, by written notice:
>
> (a) require any such person to furnish a sworn statement in writing enumerating all movable or immovable property belonging to or possessed by the person, his agent or trustee, and by the spouse, sons and daughters of the person, and specifying the date on which each of the properties enumerated was acquired whether by way of purchase, gift, bequest, inheritance or otherwise;
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) ...

Section 25(2) makes it an offence if the person to whom such notice is sent wilfully negelects or fails so to comply with the terms of the notice within such time as may be specifed therein.

The said notice was issued by the Deputy Public Prosecutor (DPP), Johor, one Yacob bin Atan (PW1) upon request from the Anti-Corruption Agency (ACA), Johor. The Director of the ACA, Johor, PW7, came personally to meet the DPP (PW1) at his office on 10 December 1984 and forwarded his request vide a covering letter (a copy of which was tendered by the prosecution as Ex. P4). The notice required the respondent to furnish to the DPP a sworn statement enumerating all movable or immovable property belonging to or possessed by the respondent, his agent or trustee and by his wife, sons and daughters and specifying the date on which each of the properties enumerated was acquired whether by way of purchase, gift, bequest, inheritance or otherwise on or before receipt of the notice. The notice further required the respondent to deliver or send by post the sworn statement 21 days from the date of service of the notice. The notice was served personally on the respondent by an ACA officer, PW9, on 11 December 1984, that is the next day, and he acknowledged receipt of it on a copy of the notice (P1).

In response to the notice the respondent submitted to PWl a statutory declaration sworn on 28 December 1984 (Ex. P2) containing a list of assets owned by his wife and him. In answer to the respondent's query which was made in person, PWl informed him that the declaration (P2) must contain the full particulars of the assets declared. On 4 February 1985 the Johor State Legal Adviser's office which also housed the DPP's office, and were under the same administration, received another statutory declaration (Ex. P3) from the respondent containing a list of assets, the contents of which were more or less similar to P2 but with certain additional details. P3 was later collected by the ACA.

In the course of investigation the ACA discovered that the respondent omitted to declare in P3 a joint Savings Account No. 4779 with Public Finance Berhad, Johor Bahru, of which he was a joint account holder together with his wife, one Teoh Suu Hwa. Evidence adduced by the prosecution showed that the said account was opencd on 11 September 1984 and was closed on 12 December 1984. PW4 who gave evidence for the prosecution on behalf of Public Finance Berhad stated that on the day the account was closed there was a balance of RM39,868.02 and that, on the day it was closed, there was a withdrawal of RM30,000 in the form of an open cheque (Ex. P6) issued by the finance company made payable to the said Teoh Suu Hwa and that the balance of RM9,868.02 was withdrawn by cash. PW4 also stated that the withdrawal by cheque (P6) was made by the said Teoh Suu Hwa. Evidence adduced show that P6 was credited into the account of one Lim Fook Shin @ Lim Chan Sin, PW10 at Malayan Banking Berhad, Jalan Tebrau Branch, Johor Bahru.

The respondent was arrested on 29 April 1987 and was charged in the Sessions Court, Johor Bahru on 16 May 1987 with an offence under s. 25(2) of tile Act, namely, for wilfully omitting to declare in P3 the cash in the said account. At the end of the prosecution case the Sessions Court Judge acquitted and discharged the respondent without calling for his defence after finding that the prosecution had failed to establish a *prima facie* case and hence this appeal.

In his grounds of judgment (at p. 135 of the Record of Appeal) the Sessions Court Judge made the following findings of fact, namely:

(i) that the order under s. 25(1) of the Act was issued by the DPP, PW1, upon the request of the ACA, Johor;

(ii) that the respondent and his wife had a joint Savings Account No. 4779 with Public Finance Berhad, Johor Bahru;

(iii) that the said joint Savings Account was opened on 11 September 1984 and closed on 12 December 1984;

(iv) that on 11 December 1984 there was a balance of RM39,868.02 in the said joint Savings Account.

The Sessions Court Judge however held that the prosecution had failed to make out a *prima facie* case due to the following:

(i) he had doubts that Exhibit P1, which is a copy of the notice under s. 25(1) issued by the DPP, PW1, had the same contents as the original notice as there were several'cancellation marks in the said exhibit;

(ii) no explanation was given by the prosecution with regard to the several cancellation marks appearing in P1;

(iii) the heading to P1 refers to a non-existing Act, namely "The Prevention of Corruption Act No. 57 of 1971";

(iv) exhibit P4, which is a copy of the covering letter from the ACA requesting the DPP to issue the notice under s. 25(1) of the Act, was introduced contrary to s. 66 of the Evidence Act 1950, namely, no notice was given by the prosecution of its intention to introduce secondary evidence;

(v) the DPP did not give sufficient consideration to the notice when he issued it.

At the commencement of the hearing of the appeal Counsel for the respondent made a preliminary objection stating that the Notice of Appeal which appears at p. 1 of the Record of Appeal refers to a charge under s. 4(a) of the Prevention of Corruption Act 1961 whereas the respondent was charged with an offence under s. 25(2) of the said Act. In response to the objection, the DPP who appeared for the appellant made an oral application to amend the Notice of Appeal accordingly from s. 4(a) to s. 25(2). I allowed the application as I am of the view that it was merely a clerical error. I do not think the respondent or his Counsel was ever misled or taken by surprise by the error. Furthermore paragraph 1 of the Petition of Appeal specifically states that the respondent was charged with an offence under s. 25(2). Section 307 of the Criminal Procedure Code provides that any person who is dissatisfied with any judgment by any Magistrate may prefer an appeal to the High Court by lodging a notice of appeal. The appellant had complied with the said s. 307 and in his notice clearly referred to the correct respondent and the correct case number. Furthermore such an error clearly came within and was curable under s. 422 of the Criminal Procedure Code and I find that the error had not at all occasioned a failure of justice. As such I overruled the preliminary objection made by Counsel for the respondent.

With regard to the appeal proper, the DPP submitted that the prosecution had proved all the ingredients of the case, namely, that on 4 February 1985 when the respondent submitted his statutory declaration (P3) listing all his assets to the DPP he wilfully omitted to disclose the money he had in the said account with Public Finance Berhad; neither did he declare that such an account existed. He further submitted that Exhibit P1 was only a copy of the said notice addressed to the respondent and that the prosecution had adduced evidence to show that the original copy of P1 was served personally upon the respondent by PW9, an ACA officer. The respondent had acknowledged receipt of the original copy by attaching his sig-

nature on the second copy which is Exhibit P1 and that the respondent had kept the original copy. The DPP submitted that this evidence was never challenged by the respondent during cross-examination of PW9 and as the said account and its balance was never listed or mentioned in P3, by this wilful omission, the respondent had committed an offence under s. 25(2) of the said Act. He argued that since the notice required the respondent to enumerate all his assets possessed by him on or before receipt of the notice, and the date of receipt was 11 December 1984, he had committed an offence under s. 25(2) by not declaring the said amount of money in the said account which was still existing on 11 December 1984. As such he urged that the appeal be allowed and that the respondent be called upon to enter his defence;

In his reply, Counsel for the respondent argued that in order to establish a *prima facie* case the appellant has to prove the following:

(a) a valid and lawful notice was issued urider s. 25(1) of the said Act;

(b) the respondent was served with such a notice;

(c) that the respondent wilfully disregarded the requirements of the notice.

With regard to the first ingredient, Counsel for the respondent submitted that the issuing of P1 was improper. He argued that the notice can only be issued in the course of an investigation or proceeding under the Act and that the DPP did not apply his mind when he issued the said notice as he was not shown any official investigation paper when the ACA Director, PW7, met him. The notice was also bad in form and not proper as it referred to a non-existent Act, namely, "The Prevention of Corruption Act No. 57 of 1971". Furthermore there were several cancellation marks in P1, made in pencil, and thus the notice was invalid. Counsel then urged the Court to dismiss the appeal.

It is clear that this case evolved purely on questions of facts. Bearing in mind the decision in the case of *Tan Boon Teck v. PP* [1950] MLJ 44, namely, that "an appeal is merely a continuation of the trial, and throws open all the evidence to re-examination in order to determine whether or not the various findings of the trial Court are correct", I found it necessary to review the whole of the evidence adduced by the prosecution.

The Sessions Court Judge had made certain findings of fact as stated earlier, namely that PW1, the DPP, had issued the notice under s. 25(1) of the Act and that the said account was in existence on 11 December 1984. However he seems to have doubts that the contents of P1 were the same as the original due to the several cancellation marks. He stated further that no explanation was given by the prosecution with regard to those marks. Furthermore he found that the heading of P1 refers to a non-existent Act and that the DPP had not given sufficient consideration before issuing the notice. He also held that Exhibit P4, being only a copy, was improperly tendered contrary to s. 66 of the Evidence Act 1950 as no notice was given by the prosecution.

The first issue is whether the notice under s. 25(1) of the Act was lawfully issued by the DPP. Section 25 (1) provides that the DPP may issue such notice in the course of any investigation or proceedings into or relating to an offence under the Act. The DPP, PW1, gave evidence that PW7, the Director of the ACA, Johor, came to see him to discuss about some preliminary inquiry or investigation that was being conducted against the respondent and upon PW7's request, he issued the notice. PW7 gave evidence that he went to brief PWl on 10 December 1984 and handed to him the original copy of P4. After the briefing, PWl issued the notice. He gave evidence that the reference number of P4, namely "BPR (Joh)

203" relates to his department's general correspondence file and the reference number referred to in the second paragraph of P4, namely, "No. 42/7/84", relates to an ACA investigation paper. PW7 then explained that his role in the investigation conducted against the respondent was only supervisory, that is, he only gave instructions and that the investigation was conducted by another officer. PW9, an ACA officer, gave evidence that he was the investigating officer of the said investigation paper No. 42/7/84. He gave evidence that he was investigating a case against the respondent for an alleged offence under s. 4(a) of the Act and in the course of investigation, recorded a statement from the respondent under s. 112 of the Criminal Procedure Code. PW9 also gave evidence that in the course of investigation, he recommended that a notice under s. 25(1) of the Act be issued against the respondent and that the notice, P1 became part of his investigation.

It is clear that under s. 25(1) of the Act, the Public Prosecutor has a discretion whether to issue such a notice in the course of any investigation or proceeding under the Act. It is clearly up to him. Under our present system, the Public Prosecutor does not conduct investigations. Section 5(2) of the Anti-Corruption Agency Act 1982 reads as follows:

> For the purposes of this Act, the Prevention of Corruption Act 1961, and any prescribed law, an officer of the Agency shall be deemed to be a police officer and shall have all the powers and immunities of such officer appointed under the Police Act 1967, and the Criminal Procedure Code and any other written law shall be construed accordingly.

Under the said s. 5(2), read together with the provisions of the Criminal Procedure Code and the Police Act, it is clear that ACA officers are empowered to carry out investigations for any offence under the Prevention of Corruption Act 1961. They accordingly have powers to conduct investigations based upon information received or from reports lodged. To exercise certain powers they need an order or consent from the Public Prosecutor, for example, under s. 23(1) of the Act, the Public Prosecutor may authorise the investigation of any bank account or any safe deposit box in any bank by issuing an order and, under section 24 of the Act, he may issue an order giving authority to ACA officers to inspect bankers' books. The Public Prosecutor or the DPP, as in this instant case, would only know the existence of any investigation being conducted by ACA officers if they brief or submit investigation papers to him. He has a discretion to issue any order or notice upon their request. The duty of an ACA officer is to gather evidence and if the officer is of the view that certain information can assist his investigation, as in the instant case information on the respondent's assets, he has to make a request to the Public Prosecutor or the DPP and convince him that the issuance of the order or notice to obtain such information would assist him in the investigation. The prosecution evidence in the instant case show that PW7, acting on the recommendation of PW9, the investigating officer, had briefed the DPP (PW1). It is clear from the evidence adduced that PWl was satisfied that the notice would assist the ACA in their investigations.

From the evidence adduced by the prosecution I cannot see how the Sessions Court Judge can come to the conclusion that PWl did not give sufficient consideration when he issued the notice. I find that his decision on this matter was grossly against the weight of the evidence. PW7 had brought the said covering letter from the ACA when he met PW1. The letter is an official letter and it bore the reference numbers of the ACA's general correspondence file and the relevant investigation paper. PW9 gave evidence that the investigation paper was opened based upon a police report No. 11813/84 (Exhibit D11). As such I find that the Sessions Court Judge had come to a wrong conclusion when he held that PWl had not given sufficient consideration when he issued the notice to the respondent. There was nothing to suggest that the DPP had issued the notice without considering the merits of the application.

It is a general rule that the Courts do not probe into the merits of a discretionary action or decision. As stated by Professor M.P. Jain at p. 279 in his book, "**Administrative Law of Malaysia and Singapore**":

> This is the basic proposition. The Courts do not question a discretionary decision or action on such grounds as: whether it should have been taken or not; whether some other decision ought to have been taken; whether it is correct or proper; whether the grounds on which it is based are sufficient or not. A Court does not substitute its own decision for that of the concerned authority.

The author went on to discuss, at p. 282 of the same book, that the Courts have given an expansive interpretation to this doctrine and have read some implied limitations on the exercise of statutory discretions. He said the grounds on which the Courts review exercise of discretionary powers fall into two major categories, namely:

(a) when the authority abuses or exceeds its powers; or

(b) when the authority fails to exercise its discretion.

In the instant case I cannot find any material to show that PWl had exercised his discretion unlawfully. There is also nothing to show that he had abused his power. On going through the appeal record, I am of the view that, with respect, the Sessions Court Judge's decision on this matter seems to have been influenced by the allegations and insinuations which arose during cross-examination of witnesses by defence Counsel. Counsel seems to suggest, during cross-examination of PWl and one Lim Fook Shin @ Lim Chan Sin, PW10, that these two witnesses had a special relationship. The prosecution evidence show that PW10 was the recipient of the said cheque (Exhibit P6) for the sum of RM30,000 issued in favour of the respondent's wife and that P6 was banked into PW10's account with Malayan Banking Berhad. PW10 gave evidence that the said RM30,000 was a loan to him from the respondent and admitted that the repondent's wife had filed a civil suit against him to recover the loan. Defence Counsel alleged during cross-examination of PW10 that the latter had used the office of PWl to extort money from the respondent as both PWl and PW10 had intentions to set up a finance company. Defence Counsel seems to suggest that PWl and PW10 had conspired to extort the sum of RM30,000 from the respondent. Be that as it may, how PW7 and PW9, the ACA officers, came into the scenario escapes me. With respect, the Sessions Court Judge should have carefully sieved through the allegations and insinuations made by defence Counsel and should not take into account any allegation which has no bearing on the charge against the respondent. The ingredients of an offence under s. 25(2) of the Act are simply as follows:

(i) that a notice was issued under s. 25(1);

(ii) that the accused was served with the notice;

(iii) that the accused had wilfully neglected or failed to comply with the terms of the notice.

I am of the view that if the Sessions Court Judge had directed his mind to the ingredients of the charge and had considered properly the evidence before him, he could not have come to the conclusion that he did.

The second issue is whether the Sessions Court Judge had a basis to doubt the authenticity of the copy of the notice, as it contained cancellation marks. From the evidence adduced it was clear that the original copy of the notice had been served upon and handed over to the respondent. He had acknowledged receipt upon the copy, Pl. Counsel for the respondent had never suggested during cross-examination of PW1, PW7 and PW9 that the con-

tents of P1 are not similar to the contents of its original copy. PWl had identified that P1 is a carbon copy of the notice issued by him and he had identified his signature. The existence of the cancellation marks in P1 arose at the close of the prosecution's case when the DPP, upon realising its existence, made an oral application under s. 425 of the Criminal Procedure Code to recall PWl and PW9 and to call the DPP who was conducting the prosecution in the early stage of the trial. The application was allowed by the Sessions Court Judge.

Section 425 of the Criminal Procedure Code reads:

> Any Court may at any stage of any inquiry, trial or other proceeding under this Code summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

In my opinion once such an application is allowed after the prosecution had closed its case, I would have thought the effect of it would be that the trial should simply proceed as if the prosecution had not closed its case. However, at the suggestion of defence Counsel, the Sessions Court Judge agreed to call this stage of the trial an "enquiry". Under what authority it is to be referred to as an "enquiry" escapes me. I cannot find any provision in the said Code which provides that the Court has to hold an "enquiry" when it allows witnesses to be recalled or allows new witnesses to be called to give evidence after the prosecution has closed its case. Be that as it may, the prosecution called one Bakar bin Jais who was the DPP who had earlier conducted the prosecution and had introduced P1 as an exhibit when PWl gave evidence. The said DPP confirmed that there were no such cancellation marks in P1 when he tendered it. The investigation officer of the case, PW9, who was recalled gave evidence that there were no such cancellation marks in P1 when he was handling it. PW1, who was also recalled, confirmed that there were no such marks when P1 was tendered as an exhibit through him at the commencement of the trial.

As the Sessions Court Judge had treated this part of the trial as an "enquiry" he offered defence Counsel the opportunity to call witnesses presumably to rebut the prosecution's case. Counsel called one Chin Tuai Gut who was a court interpreter on duty at the trial and she stated that she remembered having seen the cancellation marks when she made a photocopy of P1 at the request of defence Counsel. She could not however remember the date. Defence Counsel, Muhamad Shafee bin Abdullah, who offered himself as a witness for the "enquiry", gave evidence that the cancellation marks were already there when he had sight of P1 for the first time. At the end of the "enquiry" the Sessions Court Judge adjourned the case to a later date for decision and wrote in his notes "Whether defence to be called based on the additional above evidence out of the enquiry".

It is my finding that the "enquiry" was an irregularity and not provided for in the Criminal Procedure Code. Notwithstanding that the "enquiry" was an irregularity, I find that it can be cured by s. 422 of the said Code and that it had not occassioned a failure of justice. After all the respondent was represented by Counsel at the trial and it was his Counsel who convinced the Sessions Court Judge that it should be called an "enquiry". It is also my finding that the additional evidence adduced formed part of the prosecution case. That being so, I find that the additional evidence adduced clearly show that there were no such cancellation marks when P1 was introduced as an exhibit. P1 had been tendered as an exhibit at the commencement of the trial, and as a matter of course, once an exhibit is tendered in Court during a trial, it has to remain in the custody of the Court unless, as provided under s. 407 of the Criminal Procedure Code, the Court makes such order as it thinks fit for its custody

during the trial. In the instant case I cannot find anything in the notes of evidence to show that the Sessions Court Judge had made any order as to the custody of Pl. From the lengthy cross-examination of PWI at the commencement of the trial, and as admitted by him, defence Counsel had sight of P1 in the early stages of the trial as he refers expansively to it. would have expected him to question PWl and PW9 about the cancellation marks if it had existed when they first gave evidence. Be that as it may, I cannot see how the respondent could have been prejudiced by the cancellation marks in P1 as his writing and signature appears on it and furthermore he has been served with the original copy.

The Sessions Court Judge had also stated in his grounds that since the notice issued by PWl refers to a non-existent Act, it did not fulfil the right of the respondent to receive a correct notice and hence held that benefit of the doubt has to be given in favour of the respondent. The heading of P1 and the purported exercise of power by the DPP within its body referred to "The Prevention of Corruption Act No. 57 of 1971" which clearly was erroneous as to the year of the Act. The question raised here is whether such error will invalidate the notice and hence the subsequent proceedings against the respondent. In my opinion the actual issue would be whether the respondent was misled by the error and whether such error had occasioned a failure of justice. To me it was a mere clerical error that could not have occasioned a failure of justice. The correct title of the Act is "Prevention of Corruption Act, 1961" as provided for in s. 1 of the Act. The Act was given the number "Act 57" and it was revised in 1971. On the cover of the revised Act as published by Government Printers the title appears as follows:

Laws of Malaysia

Act 57

Prevention of Corporation Act, 1961

(Revised - 1971)

It is my finding that the error in quoting the year as "1971" instead of "1961" is not material or so defective as to vitiate the notice, neither was it misleading. The number of the Act quoted in the notice is correct and it is clear that the Act was revised in 1971. In the case of *Lee Chiang Seng & 9 Ors. v. PP* [1967] 2 MLJ 32, the charge against one of the accused referred to s. 50 of the Road Traffic (Amendment) Act, 1966 instead of s. 50 of the Road Traffic Ordinance, 1961 and this mistake was contained in the grounds of appeal by the accused; at p. 33 of the report, Winslow, J said:

> It was argued that this charge did not disclose any offence known to law. It seems to me that there is no merit in this contention. The ingredients of the particular offence required to be proved under s. 50 of the Road Traffic Ordinance, 1961 have been clearly set out and I do not think that any mistake in referring to s. 50 of the Road Traffic Ordinance, 1961 as s. 50 of the Road Traffic (Amendment) Act, 1966 is so defective as to vitiate a conviction thereunder on this ground alone.
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> In *R. v. Koomah* it was held that the mistake was only as to a matter of form and the Court amended the conviction by striking out the incorrect citation and inserting the proper one.

Although the above case referred to a defective charge, the same principle is applicable here, that is, a mistake as to a matter of form, namely, an incorrect citation of an Act, is not so defective as to vitiate the notice issued by the DPP under the Act. It is clear that there is only one Prevention of Corruption Act and that it was revised in 1971. I cannot agree with the finding of the Sessions Court Judge that the error above has created a doubt in the prosecution's case.

The third issue raised by the Sessions Court Judge in his grounds was that the letter from the ACA, exhibit P4, was introduced as an exhibit contrary to s. 66 of the Evidence Act. It is clear that P4 was a carbon copy and the signatory was PW7, the ACA Director. He gave evidence that P4 was a copy and that the original letter was handed to PW1. PW3, a legal assistant from the State Legal Adviser's office, gave evidence that he could not trace the original letter from his records. From the facts elucidated in this case, I do not understand why the Sessions Court Judge laid such an emphasis on P4. It was merely a letter prepared in the normal course of administration by a government department and it has no bearing upon the charge before the Court. No doubt it is a carbon copy but it is still a public document as defined under s. 74 of the Evidence Act 1950 and is certainly admissible under s. 65 of the same Act. In *PP. v. Rengasamy* [1974] 1 MLJ 223, with regard to carbon copies, Wan Hamzah J held:

> I hold that the carbon copies of the analysis cash books are not secondary evidence under s. 63(b). I hold that they are primary evidence falling under s. 62 (Explanation 2) of the Evidence Act, being documents made by one and the same uniform process as the top copies, and therefore they are admissible as primary evidence under s. 62.

It is my finding that no such notice as contemplated by s. 66 of the Evidence Act needed to be given when P4 was introduced.

As stated earlier this case evolved purely on questions of facts. The notice required the respondent to furnish a sworn statement to the DPP enumerating all his movable or immovable property belonging or possessed by him, and the immediate members of his family, on or before 11 December 1984. His wife and him jointly possessed RM39,868.02 in the said account on 11 December 1984. The prosecution evidence had shown that the respondent had failed to comply with the terms of the notice when he wilfully neglected or failed to include the existence and details of the said account in P3, and this is the crux of the charge against him. It was also clear that the offence was committed when P3 was received by the State Legal Adviser's office on 4 February 1985.

As stated earlier, an appeal is merely a continuation of the trial and throws open all the evidence to re-examination in order to determine whether or not the various findings of the trial Court are correct. After reviewing the record of appeal and the grounds of the Sessions Court Judge, it is my finding that his decision was grossly against the weight of evidence. The prosecution case clearly show that they had established the charge against the respondent beyond reasonable doubt. That being so, the order of acquittal made by the Sessions Court Judge is hereby reversed and the respondent is ordered to be called to enter upon his defence. I accordingly order that this case be reverted back to the Sessions Court for continuation of the trial before the same Sessions Court Judge.